BRONISŁAW SITEK
Wyższa Szkoła Gospodarki Euroregionalnej
im. Alcide De Gasperi w Józefowie
bronislaw.sitek@gmail.com
ORCID 0000-0002-7365-6954

Human reputation from Roman law to cyberspace

ABSTRACT

The subject of the study is the analysis of the Roman concept of infamy and its reception in medieval canon law. The study presents the legal consequences of infamy in the field of private and public law. The concept of reputation is the equivalent of this term. This concept is rarely used in the legal language of Polish legal acts. However, it appears in the normative acts of the European Union. The aim of the work is to present the evolution of good or bad fame from Roman law through medieval canon law to the contemporary understanding of the notion of reputation. As a research hypothesis, it was accepted that the term reputation is the opposite of the "Infamy" concept. The aim of the work is to be achieved with the help of the analysis of historical and contemporary law. In the final conclusions it has been shown that the reputation does not apply to moral qualifications, but to professional qualifications and experience.

KEYWORDS: *infamy, Roman law, professional qualifications, right to good name*

Introduction

One of the important determinants of human position in society is reputation. According to the Polish language dictionary, this term means the opinion which someone has in society, understood in the micro and macro scale. According to Agata Adamska and Tomasz J. Dąbrowski, the reputation is a set of features attributed to a human being which may be

concluded from human past activities. Reputation is most often based on repetitive behaviours that are evaluated by others. Sometimes, however, single behaviour may determine the positive or negative assessment of an individual by a social group.

Reputation is not the property of the evaluated entity, but the value assigned by the evaluators (Adamska, Dąbrowski, 2017, pp. 81–82). The assessed one does not always influence the content of the reputation which he or she has in the social group. As a rule, the reputation of a person can be influenced by lifestyle, occupation, membership in a social group, external appearance, education, views, political affiliation, but also a single act, for example: murder in an affair causes the perpetrator to remain in the public opinion forever as a murderer. From this perspective, reputation becomes the value on the basis of which a person is positioned. Reputation is a variable value in the long term, depending on culture, including legal culture.

However, one must realize that in the doctrine there is a discrepancy in the meaning of the term reputation and its correlation with the synonymous terms, such as image, good name, home, appearance, etc. (Kołata, 2013, p. 186). A research thesis can be accepted that the modern concept of reputation is correlated with the Latin term infamy. The aim of the work is to examine the meaning of both concepts and their role in the system of Roman law, canon law of the Middle Ages and in Polish and EU law.

Nowadays, the notion of reputation refers not only to a natural person, but also to a legal person, which are for example: a capital company, foundation, association, church, local government unit and even a state. The notion of reputation also applies to the image of defective legal persons, which are the organizational units without legal personality, such as: primary school or personal partnerships. This term is currently referred mainly to the sphere of enterprise evaluation. Reputation has a huge impact on the company's position in the market and marketing of its products or services (Pęksyn, 2014, pp. 517–528). Therefore, there is the need to manage the company's reputation, which in turn is transferred to the management of the physical person's reputation.

In this study, the consideration of reputation will be limited to physical persons. In this context, the concept of reputation coincides with the concept of the good name of a human being broadly understood, and classified as a category of subjective rights, which are embodied in human rights and personal rights.

Reputation in Roman law

The ancient world was characterized by a completely different social structure than current world. It is of fundamental importance that the current position of a human being in society, including his or her reputation, is protected by law. The statutory provisions are based on constitutional principles, such as: equality of all people before the law, prohibition of any discrimination, the principle of inviolability and respect for human dignity, the principle of equality or the fundamental principle of human freedom (Augustyniak, 2006, p. 11).

In the Roman law, the equivalent of the modern concept of reputation is the term infamy, which means disgrace or loss of reputation in social thinking, as a result of various events, such as a profession, social position or conviction. The preserved fragment from the lawyer Julianus is of fundamental importance here.

Iul. 1 ad ed. (D. 3.2.1.): *Praetoris verba dicunt: "infamia notatur qui ab exercitu ignominiae causa ab imperatore eove, cui de ea re statuendi potestas fuerit, dimissus erit: qui artis ludicrae pronuntiandive causa in scaenam prodierit: qui lenocinium fecerit: qui in iudicio publico calumniae praevaricationisve causa quid fecisse iudicatus erit: qui furti, vi bonorum raptorum, iniuriarum, de dolo malo et fraude suo nomine damnatus pactusve erit: qui pro socio, tutelae, mandati depositi suo nomine non contrario iudicio damnatus erit: qui eam, quae in potestate eius esset, genero mortuo, cum eum mortuum esse sciret, intra id tempus, quo elugere virum moris est, antequam virum elugeret, in matrimonium collocaverit: eamve sciens quis uxorem duxerit non iussu eius, in cuius potestate est: et qui eum, quem in potestate haberet, eam, de qua supra comprehensum est, uxorem ducere*

passus fuerit: quive suo nomine non iussu eius in cuius potestate esset, eiusve nomine quem quamve in potestate haberet bina sponsalia binasve nuptias in eodem tempore constitutas habuerit.

The above cited text lists the groups of people who, according to the edict of the praetor, were officially marked with disgrace, that is, they were negatively evaluated in society, which entailed certain consequences. Such persons included: deported from the army, actors, and even people occasionally playing on the stage, panders, people convicted in criminal proceedings for making false accusations (*delatores*), those who participated in the collusion of prosecutions (*praevaricatio*), persons accused of theft (*furtum*), assault (*rapina*), insult (*iniuria*), deceit (*dolus*). Further, this group included people convicted for the company (*actio pro socio*), care (*actio tutelae*), mandate (*actio mandati directa*) or deposit (*actio depositi directa*). In the end, Julianus wrote about a series of people who might have been disgraced because of the fact of getting married – for example widows with disobedience to the principles of *tempus lugendi* (Niczyporuk, 2001, pp. 139–149). On the subject of infamy in the Roman law, there was quite a wide range of literature in foreign languages (Greenidge, 1895, pp. 30, Kaser, 1956, pp. 220-278, Chiusi, 2011, pp. 89–105) and just few positions in Polish language (Loska, 2018, p. 62., Burdyka, 2015, pp. 85–96, Sokala, 1992, p. 5 n.).

The cases cited by Julianus are not the closed catalogue of people marked by infamy in Roman law. With the time, it was extended by the constitutions of Roman emperors (Sitek, 2003, p. 15). Such people as: those who inflicted adultery (C. 9.9.13), bigamy (C. 9.9.18), practiced usury (C. 2.11.20), or preached heresy during the domination of the Christian religion (Coll. 15.3.7) were put also on the infamy list.

The cases of infamy occurrence can be divided into those that exist *de facto* and *in iure*. This division resulted from the fact that some of them resulted from lifestyle – *de facto*, for example: prostitution, being a gladiator or bigamy. In this case, the declaration of infamy was made by the censor during the census. The source of infamy could be a civilian court's sentence (a conviction on the basis of one of the infiltration complaints, e.g. *actio pro*

socio) or criminal court's judgment (a conviction for a flogging penalty was often combined with a punishment of infamy: D. 48.19.28.1, C. 2.11.14). The infamy was used as an additional criminal sanction.

In the ancient world, the position of human being is conditioned by customary norms resulting from tradition. They placed the human in society and determined his or her perception by others. In ancient Rome, as in the entire ancient world, the basis of the principle of social structure was the division into free people and slaves (G. 1.9). The slave was treated as the thing with the ability to speak – *instrumentum vocale*. Thus, he or she was the subject to a regime of property rights, including property law. In relation to a slave, therefore, one cannot talk about having human dignity. In the Roman law, there were legal provisions which protected slaves from excessive hardship of their owners (Longchamps de Berier, 2001, pp. 89–99). Also, the work done by the slaves could have influenced his or her position after the liberation.

Among the free people, subsequent divisions were important, namely citizens (*cives romanorum*) and non-citizens (*peregrini*). The latter group functioned regardless of place of residency. Until 212, that is, to issue the Constitutio Antoniana, most of the empire's inhabitants were just *peregrini*. Their social position, but also their reputation was decidedly lower than *cives Romanorum* (Loska, 2014, pp. 167–191).

The financial situation or the belonging to an appropriate social group had a big impact on the person's reputation. This differentiation was evident even in the sphere of witness function. A person from higher society, for example – *nobilitas*, was considered to be more credible from the one who was poor or belonged to poorer social strata. According to Herennius Modestinus, the judge should examine the credibility of the witness, taking into account the criterion of its origin, but also the customs presented by him or her and the constancy of character (D. 22.5.2). Kalistratus, on the other hand, wrote about the importance of whether a witness is rich or poor. The rich one, in his opinion, will not easily commit bad deeds, means – he or she will not give false testimony in order to achieve his or her own benefits (D. 22.5.3) (Umberto, 1989, pp. 109–112).

3. Reputation in the Middle Ages

In literature, the Middle Ages in Europe are described as the universal world. The ideological building material for that world was Christianity, as well as reminiscences to the Western Roman world (Roguska, 2011, p. 16). The attempt to rebuild *Sacrum Imperium Romanum*, first by Charles the Great, and then by German emperors were the example of this return to the continuation of ancient ideas (Vermander, 2010, pp. 23–40). An important element connecting the Roman world with the Middle Ages was Roman law. As a result, the Roman law was merged with the canon law that was being developed at that period (Dębiński, 2009, pp. 1009–1018).

It is clear that in the Roman-canonical legal system which dominates in the Middle Ages, the solutions typical for that period should be found, including when it comes to the concept and the use of institutions of infamy. It should be emphasized that some doctrinal solutions regarding the correctness of behaviours which then applied in the Middle Ages, were developed in the writings of the Church Fathers and Church writers from the time of the end of ancient era. The solutions mainly concerned clergy. However, it was also analogously applied in secular legislation.

Piotr Skonieczny argues that the canonical law speaks more about a good name (*bona fama* or *bona exsistimatio*), not about the defamation. It is, therefore, a change in relation to the Roman concept of opinion about a human being, from a negative to a positive one. Typically, the Roman concept of infamy could not be accepted in canon law, and this is because Christianity did not differentiate people because of gender, origin or social status. This was quite unequivocally stated in a letter to the Galatians by Saint Paul (Galatians 3.28) (Skonieczny, 2009, p. 67). This new approach to good and bad fame in canon law has been preserved in the canon 220 Canon law of the Catholic Church from 1983.

In the collection of canon law in the Middle Ages, however, there are quite clear wordings containing the concept of infamy associated with the concept, quite strongly modelled on the solutions developed in Roman law. An example of this is the deprivation of those people of the possibility to perform the function of a prosecutor or guardian, as well as the appearance of

legal action in their own or other people's cases. However, certain exceptions were made to these rules, namely, defiled person could bring actions on behalf of: parents, own children, patron and his children, brother, sister, son-in-law, daughter-in-law, deaf, prodigal person (*prodigus*) (Gracian Decree, part II, c. II qu. VII).

Another example of the reception of Roman solutions in canon law in reference to the use of infamy is the breaking of the ban on marriages between close relatives. Gracian recognizes that the concept of relatives (*consanguinei*) in canon law is identical to those used in the Roman law and the Greek laws (the Byzantine law). *Eos autem consanguineos dicimus, quos diuinae, et inperatorum, ac Romanorum, atque Grecorum leges consanguineos appellant, et in hereditate suscipiunt, nec repellere possunt*. People breaking the prohibition of entering into marriage between relatives became the defiled persons (Gracian Decree, part II, c. II qu. II and III).

The cases of using infamy in the canonical law and in the secular law were not fully identical, as Gracian wrote about: ... *non fiunt infames lege canonum omnes quos leges seculi infames pronunciant* ... (Gracian Decree, part II, c. II qu. III).

The basic solutions regarding good or bad fame concerned people who held important functions in the church, but also situations related to lifestyle or with passed court judgments. Hence, following the Roman law, the canon law adopted the division of infamy into infamy under the law and resulting from the actual human behaviour - *infamia iuris et facti*. It is not possible to analyze all sources of canon law from the medieval period; therefore there is the necessity to limit the presentation to the Gracian Decree (Laemmer, 1892, pp. 96–97).

In the second part of the Gracian Decree, the cases of falling into disrepute by virtue of law or on the basis of a court judgment were quoted. Also, the circumstances have been given which have freed from such sanctions. And so, infamy was punished by people convicted of heresy or bigamy. As a consequence, they were excluded from participation in the sacraments, especially in the Eucharist. This exclusion from the community of the Church was not permanent, but it lasted until the conversion, it means

- the withdrawn from sin and turning back to God, in accordance with the principles of the Catholic faith (Gracian Decree, part II, c.I. Q. XLII). In a similar situation was a person who brought charges against someone to court, and then he or she was unable to prove the complaint (Gracian Decree, part II, c. V qu. V).

The possibility of self-cleaning of a priest from the infamy was another interesting case. Namely, if a priest in a particular community would be dishonoured or otherwise defied (*infamia populari*) then he could take an oath to show his innocence. The strength of such an oath, however, had to be judged from the perspective of those times. In those times, all kinds of promises and vows are easily made without much binding to its contents (Gracian Decree, part II, c.II qu. IV).

A negative opinion about a particular person (*publica fama*) could have been a sufficient basis to initiate the inquisitorial process from the office. Such a rule was introduced by Pope Innocent III (1198–1216) in relation to rumours (*clamor publicus*) about murder, heresy or perjury. In these cases, the judge could have initiated the truth-finding procedure. The recommended procedural measures that should have been used at the initial stage (*inquisitio praeparatoria*) could not be too intrusive. Only in the case of suspicions of heresy or witchcraft, even torture could be used at the initial stage to clarify matters (Plöchl, 1963, pp. 340–341).

Contemporary issues related reputation

In the modern legal systems of the so-called Western culture, infamy has ceased to be an institution of law. Therefore, there is no legal basis for adjudicating infamy as an additional penalty for convicts even for the most serious crimes, including murder. At most, it is possible to impose a penalty of deprivation of public rights (article 40 of the Criminal Code). The similarity of this penalty to infamy lies in the fact that a person deprived of public rights loses the ability to perform public functions in the state organs, local self-government or professional bodies (Szeleszczuk, 2019, commentary to the article 40 of the Criminal Code).

Nowadays, the reputation has no legal effect in the area of private law. All environmental or social opinions about another human being have no legal effect. In the place of infamy, the concept of human right to a good name has arisen, and in connection with this law, the protection of a surname, pseudonym, image, marital status, privacy, secrecy of correspondence and immunity of a home has been introduced. It can be seen, then, that the modern antonym of Roman or, to some extent, and canonical infamy, is normatively very extensive concept which includes many components that, in total, are part of the content of the term reputation.

The issue of reputation has been included in acts of international law. It is enough to mention here the article 12 of the Universal Declaration of Human Rights or the article 8 of the European Convention on Human Rights. In the article 8, paragraph 1 of the ECHR, it was decided that every person has the right to respect for his or her private and family life, as well as his or her home correspondence. Therefore, it is unacceptable for the second person to unauthorized interfere with the life of another person, making public information which could damage his or her reputation in the public opinion.

However, it cannot be overlooked that the reputation understood in this way conflicts with the article 10 of the European Convention on Human Rights. In the paragraph 1, it was clearly stated that every person has the right to express their opinion. This law presupposes that everyone can have own views, receive and transmit the information. A human being has the right to express opinions about other people. This conflict of values is essentially resolved, because the freedom to express opinions may be subject to certain formal limitations and sanctions provided for in the laws of a particular state. The restrictions may result from the need to protect the state interest, territorial integrity or public security (Biłgorajski, 2014, pp. 11–35). Such restrictions may also result from the need to protect health and public morals, as well as the reputation and rights of others.

Under the Polish law system, the term reputation does not generally appear in the legal language. However, it entered the legal language of the European Union. And so, it can be pointed to the decision of the European Central Bank (EU) 2017/937 of 16 November 2016 on delegation of the power to adopt

fit and proper decisions and the assessment of fit and proper requirements (EBC/2016/52) (Official Journal of the European Union, L 2017 no. 141 p. 21). According to this decision, members of the governing bodies supervised by the European Central Bank must possess appropriate knowledge and reputation. According to the article 4 of this decision, the assessment of the fulfilment of the requirements of the reputation and competence is carried out in accordance with the law, while taking into account the guide for the assessment of competence and reputation. In this decision, the notion of reputation has not been defined. In the provision of the article 4b, it was stated that the member must enjoy a good reputation to ensure sound and prudent management. In this case, however, it is not about representing the moral values by the board members, but about the information that the candidate has the appropriate knowledge and experience, which will allow him or her to effectively perform management activities.

Another legal act in which the term 'reputation' appears is Regulation (EC) No 1071/2009 of the European Parliament and the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (Official Journal of the European Union, L 2009, no 300, p. 51). According to the provision of the article 3, point 1b of this regulation, the road transport operator must enjoy a good reputation. The European legislature, however, does not define this concept either.

On the basis of this directive, the concept of reputation entered into the Polish legal system together with the decree 26/2014 of the General Inspectorate of Road Transport of 21.08.2014 regarding the appointment of a team for the development of draft guidelines for testing good reputation, with reference to the article 6 of the Regulation (EC) No 1071/2009 of the European Parliament and the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (Official Journal of the European Union, L 300 of 14.11.2009, no, p. 51–71) (Journal of Laws of the General Inspectorate of Road Transport of

2014, item 12). Based on this decree, a team to evaluate the reputation was set up. However, the notion of reputation has not been defined in these both documents.

Nowadays, good reputation is a feature that indicates the qualifications of an individual, but above all, it is an element of marketing. Enterprises are managing their reputation in the market because their position and the sale of products or services depend on the reputation. But not only this, sometimes the legislator makes the issuance of a decision or permission conditional on a good reputation. There are some examples of such situation, for example - applying for a license to run a business in the field of rail transport. In this case it is necessary to have a documents confirming the fulfilment of many requirements by the entrepreneur, among others, there is good reputation (the article 46, paragraph 3, point 2a of the Act of 28 March 2003 on the railway transport – Journal of Law of 2019, item 710, consolidated text). Similar certificates must be obtained for receiving a license to conduct insurance and reinsurance activities or to run aviation or inland navigation business.

Conclusions

Roman infamy had significant legal effects in the field of private and public law. Infamed people cannot perform legal actions which require good faith or they cannot perform a number of public functions. The life style of a given person, occupation, social status or property determined the infamy. Infamy as a criminal sanction could also be imposed as a result of a court verdict.

In the Roman-canonical law in the period of the Middle Ages, the infamy continued to be used according to patterns developed in Roman law time. However, a significant change took place, namely the concept of a good fame or a good name became more and more important. For this reason, the possibility of freeing themselves from infamy by introducing a vow that the accusations are not true is introduced. Such a solution has become the foundation for building a modern concept of human right to good reputation.

Nowadays, the term infamy does not have any legal significance. In the legal system, the term reputation is its equivalent. This concept coincides with the right to a good name, and thus with the right to protect the right to privacy, image or surname. Such understanding of the term reputation, *implicite*, is reflected in the provisions of international law. Clearly, the term 'reputation' has its place in EU law. An appropriate reputation is to be represented by people holding managerial functions, for example: in banks. These new solutions, however, contain a completely different understanding of the term reputation from its everyday understanding. A member of the bank's management board should, as part of an appropriate reputation, demonstrate the knowledge and experience required to perform the entrusted function. Therefore, his or her personal moral qualifications are not import ant in this situation.

Therefore, the infamy is only a historical institution of law which does not find any reflection in contemporary normative solutions. And the modern equivalent of this term, the concept of reputation, has taken on a completely different meaning. It is not about having appropriate moral qualifications, but knowledge and experience. The term 'reputation' has also become a term used in the marketing of companies, and often the state institutions make the issuance of an administrative decision conditional upon the entrepreneur having an appropriate reputation.

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